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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 94-32

In the Matter of

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

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PP Docket 93-253

FIRST REPORT AND ORDER

Adopted: February 3, 1994

Released: February 4, 1994

By the Commission:

1. The Omnibus Budget Reconciliation Act of 1993 ("Budget Act")¹ requires the Commission to prescribe rules that are necessary to prevent the unjust enrichment of recipients of licenses or permits that the Commission issues pursuant to the lottery authority granted by Section 309(i)(4)(C) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(i)(4)(C) ("Communications Act"). This Report and Order responds to Congress' directive. We conclude that, in addition to the rigorous requirements that apply to lotteries in our existing rules, certain transfer disclosure rules are necessary to prevent unjust enrichment with respect to licenses issued by lottery. These requirements will enable us to monitor the operation and effect of lotteries closely over the next one to two years to enable us to determine if additional safeguards are necessary.

BACKGROUND

2. Our authority to issue licenses by lottery stems from Section 309(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(i). In the Budget Act, Congress added a new statutory provision concerning unjust enrichment in the lottery context to this section of the Communications Act, which states that

[n]ot later than 180 days after [August 10, 1993], the Commission shall prescribe such transfer disclosures and antitrafficking restrictions and payment schedules as are necessary to prevent the unjust enrichment of recipients of licenses or permits as a

¹ Pub. L. No. 103-66, title VI, § 6002(b)(1)(B), 107 Stat. 388, ____ (1993).

result of the methods employed to issue licenses under this subsection.²

3. In the Notice of Proposed Rule Making ("Notice" or "Auction Notice") implementing this and other sections of the Budget Act, we noted that the legislative history of this section indicated that the Commission might "impose or assess payments in order to prevent unjust enrichment resulting from trafficking in licenses."³ We tentatively concluded that we could assess payments in order to prevent unjust enrichment from lotteries. We also asked for comment on what other antitrafficking restrictions were appropriate in addition to any payments we might impose. We suggested, for example, that we might place a three year restriction on the transfer of licenses gained through lotteries.

4. With respect to the term "unjust enrichment," it appears that Congress was concerned about transactions such as that mentioned in the Notice, where we observed that lottery winners of the rural cellular license for Columbia County, Wisconsin, sold it for \$62.3 million in 1990, 165 days after a construction permit had been issued.⁴ The legislative history of the Budget Act is highly critical of those who filed applications with no intention or capability of providing service but instead "only sought to acquire a license at nominal cost and then sell it, making a large profit and at the same time delaying the delivery of services to the public." House Report at 259. The legislative history reemphasizes the need for the Commission to limit "the ability of lottery winners to sell their license, so as to prevent the churning and profiteering that has characterized lotteries." *Id.*⁵

5. The Budget Act reduces significantly the Commission's authority to conduct lotteries. If the service or class of service is potentially eligible for competitive bidding under the statutory test in Section 309(j)(2)(A), then the Commission is precluded from using lotteries to resolve mutual exclusivity among applications. *See* 47 U.S.C. § 309(i)(1)(B). Because under the Budget Act certain mutually exclusive applications may still be resolved

² 47 U.S.C. § 309(i)(4)(C).

³ Implementation of Section 309(j) of the Communications Act, Competitive Bidding, PP Docket No. 93-253, 8 FCC Rcd 7635, 7649-50, para. 89 (1993), quoting H.R. Rep. No. 111, 103d Cong., 1st sess. 256 (1993) ("House Report").

⁴ 8 FCC Rcd at 7641 n. 22. For purposes of this rule making and consistent with the intent of the Budget Act, "unjust enrichment" and "speculation" in the lottery context refer to the same act: the transfer of a license acquired by lottery for substantial profit prior to providing service to the public. Although the term "speculation" has also been associated with the large number of lottery applications generated by so-called application mills, we believe that the mere act of filing an application for a lottery does not give rise to the "unjust enrichment" that the Budget Act has required us to address.

⁵ We note that this provision was adopted in conference from the House bill without change. *See* H.R. Rep. No. 213, 103d Cong., 1st sess. 489-90 (1993).

by a lottery, we sought comment in the Auction Notice on how to implement the subject statutory provision.

COMMENTS

6. Although we received approximately 300 timely filed comments and reply comments in this proceeding, we only received two comments and no reply comments that directly addressed the subject statutory provision. The Domestic Automation Company (DAC) stated that "bona fide entities who have lost in past lotteries often have had to buy [Multiple Address Service (MAS)] licenses from those who never intended to operate systems for their own use" and urged that we adopt strict rules and restrictions to stem speculation and trafficking in licenses won by lottery. Comments of Domestic Automation Company at 7. DAC also urged that the Commission adopt restrictions that would discourage potential traffickers from participating in Commission lotteries in the first place, such as a requirement for the posting of performance bonds, similar financial guarantees and annual spectrum user fees prior to the lottery. DAC also argues that we should adopt restrictions on licensees who either fail to construct or who construct and then quickly transfer their licenses, presumably for a profit. Id.

7. The American Petroleum Institute (API) shares these sentiments, noting that speculative interest in the radio spectrum has grown to the point where the Commission now is flooded with applications each time it announces an initial lottery for licenses. Comments of API at 7. Like Domestic Automation Company, API states that bona fide entities that lost in lotteries often have had to pay greenmail to speculators to obtain licenses they need, and urges the Commission to adopt strict rules and restrictions to stem speculation and trafficking in licenses won by lottery. Id. at 8.

DISCUSSION

8. The most egregious cases of unjust enrichment and speculation associated with past lotteries have occurred in "commercial" services,⁶ where there are significant opportunities for the sale of licensed communications properties to third parties for profit. E.g., Cellular Radio Service. Therefore, possibly the strongest measure to deter future instances of unjust enrichment in the lottery context has already been taken by Congress when, in the Budget Act, it granted the Commission auction authority for all "commercial" spectrum-based services, and effectively took away the Commission's authority to conduct

⁶ See Auction Notice, 8 FCC Rcd at 7638-39 para. 25-28 (noting that for purposes of Section 309(j) of the Communications Act, "commercial service" means a subscriber-based service, and this term is substantively distinct from the term "Commercial Mobile Service," which is a term associated with Section 332 of the Communications Act).

lotteries for such commercial services.⁷ Thus, under the Budget Act, any new rules adopted to implement the subject provision would potentially apply to only three classes of license applications: 1) mutually exclusive applications in certain private, internal-use services that meet the legislative criteria in Section 309(j)(2)(A) for random selection, but do not meet the legislative criteria for competitive bidding, 2) a limited number of mutually exclusive applications in commercial services accepted for filing prior to July 26, 1993, that the Commission has the authority to either auction or lottery under the Budget Act, and 3) possibly where a private, internal-use license application is mutually exclusive with a "commercial" use application for a license in "shared spectrum," that is, spectrum for which both entities are eligible to use.⁸

9. Furthermore, we note that the Commission has recently adopted rules that should assist in preventing unjust enrichment from lotteries in a variety of commercial services, including the Interactive Video and Data Service (IVDS), Multipoint Distribution Service (MDS) and Cellular Radio Service. These rules include, inter alia, transfer restrictions tied to an ascending scale of build-out requirements over the license term, anti-greenmail rules, settlement restrictions, and restrictions on changes in control of ownership. The Commission has not yet had the opportunity to fully evaluate the effectiveness of these rules because (1) the rules were adopted within the last two years (e.g., cellular radio⁹ and MDS¹⁰), or the service is not yet operational (e.g., IVDS¹¹).

10. Because in the future, only certain private, internal-use services would be

⁷ See Auction Notice, 8 FCC Rcd at 7637, para. 17 (noting that the Budget Act provides that the Commission may not issue any license or permit by lottery after the date of enactment unless the spectrum's use is not a type for which auctions are permitted, or the application was accepted for filing before July 26, 1993). Citing Section 6002(e) of the Budget Act (Special Rule). Under the Budget Act, therefore, mutually exclusive applications accepted for filing after July 26, 1993 may not be granted by lottery until the Commission determines whether the applicable radio service is not subject to competitive bidding under Section 309(j)(2)(A) of the Communications Act.

⁸ See Auction Notice, 8 FCC Rcd 7658 paras. 139-140.

⁹ See, e.g., Third Report and Order, Memorandum Opinion and Order, and Recon., CC Docket 90-6, 7 FCC Rcd 7813 (1992)(adopting, inter alia, anti-greenmail rules), and Report and Order, CC Docket 90-358, 7 FCC Rcd 719 (1992) (adopting anti-speculation rules in the context for comparative renewal proceedings).

¹⁰ See, e.g., Amendment of Parts 1, 2 and 21 of the Commission's Rules in the 2.1 and 2.5 GHz bands, PR Docket 92-80, 8 FCC Rcd 1444 (1993)(adopting a variety of rules to deter unjust enrichment in the MDS context).

¹¹ See 47 C.F.R. Part 95, Subpart F.

subject to lottery, and such services rarely involve speculation or mutually exclusive applications, there does not appear to be a significant need at this time for new lottery rules to deter unjust enrichment. With respect to the limited number of "commercial" service applications that may be lotteried, the Commission has recently adopted rules in such services to deter unjust enrichment based on extensive experience in conducting lotteries in these services.¹² Before adopting additional measures, we believe it would be appropriate to gain some experience in how well these existing rules operate in practice.

11. In addition, the record compiled in this proceeding does not support adopting major additional measures to combat unjust enrichment in the lottery context. The two commenters that did address this matter focused primarily on MAS. In MAS, however, a licensee is required to meet certain construction benchmarks before it can transfer a license.¹³ Therefore, while an MAS lottery may attract a large number of applicants, the existing construction benchmarks deter unjust enrichment by preventing licensees from transferring an MAS license before it provides service to the public.¹⁴

12. Further, the imposition of additional, more stringent restrictions could have adverse consequences. Because the randomly selected winner of a license may not value it the most highly, additional transfer restrictions could operate to deprive the public of valuable new communications services, reduce economic growth and limit the expansion of jobs. Therefore, we do not believe that the public interest would be served by adopting additional transfer restrictions under present circumstances.

13. At the same time, we are anxious to ensure that our recently adopted measures will prevent unjust enrichment. Therefore, we will adopt a measure expressly recommended in the subject statutory provision: transfer disclosure requirements. We note that there was no opposition to the adoption of this measure in the record. Specifically, we will require lottery applicants for voluntary transfer of control or assignment file with the Commission, along with their application, the consideration they will receive if the Commission grants their applications for voluntary transfer of control or assignment. These limited reporting

¹² See, e.g., 47 C.F.R. §§ 22.920(c)(1)-(3), 22.927, 22.928, and 22.929 (cellular radio), and 95.819 and 95.821 (IVDS).

¹³ See 47 C.F.R. § 94.47.

¹⁴ *Id.* For this reason, we believe existing construction benchmarks and associated transfer restrictions adequately deter unjust enrichment in other services, such as the Specialized Mobile Radio Service (SMRs) and 220-222 MHz Private Land Mobile Radio Service.

requirements will enable the Commission to evaluate whether further restrictions are needed.¹⁵ Such disclosures will also assist the Commission in drafting its mandatory report to Congress that will compare the results of the five-year auction experiment against the Commission's lottery experience. See 47 U.S.C. § 309(j)(12). In addition, transfer price disclosure rules will allow the secondary market to function efficiently under existing restrictions against unjust enrichment.

14. Accordingly, any applicant for voluntary transfer of control or assignment would be required to file, together with its application, the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration received in return for the transfer of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below-market financing). The Commission has existing procedures for maintaining the confidentiality of such filings.¹⁶ The rules shall apply to any future applicant for voluntary transfer of control or assignment where the subject license was acquired by the transferor or assignor through a Commission lottery.

CONCLUSION

15. Because any rules adopted pursuant to Section 309(i)(4)(C) of the Communications Act will apply to only a limited number of noncommercial services where speculation rarely occurs, and because the Commission has recently taken action in a variety of commercial services to achieve the same goal of the subject statutory provision, we limit our action at this time to the adoption of transfer disclosure rules. If the data we collect as a result of this requirement indicates that our existing rules are inadequate, we may adopt additional measures to deter unjust enrichment in the lottery context.

Final Regulatory Flexibility Analysis

18. A Final Regulatory Flexibility Analysis is contained in Appendix B to this order.

¹⁵ We note that in the case of Low Power Television, the only broadcasting service subject to lotteries, the Commission currently has transfer disclosure rules. See 47 C.F.R. §§ 73.3540, 73.3597 and FCC Form 345.

¹⁶ 47 C.F.R. § 0.459.

Ordering Clause

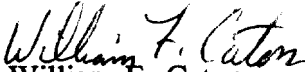
19. Accordingly, IT IS ORDERED that Parts 1, 21, 22, 90, 94 and 95 of the Commission's Rules, 47 C.F.R. Parts 1, 21, 22, 90, 94 and 95 ARE AMENDED as set forth in the Appendix A. IT IS FURTHER ORDERED that these rules are effective 90 days after publication in the Federal Register.

20. Issuance of this First Report and Order is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, section 6002, and Sections 154(i), 309(i), 303(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(i), 303(j), and 303(r).

Contact Persons

21. For further information concerning this proceeding, contact Marc Martin or Kent Nakamura, Office of Plans and Policy, (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

Appendix A

FINAL RULE

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C.154, 303;Implement 5 U.S.C. 552 and 21 U.S.C. 853(a), unless otherwise noted.

2. Section 1.924 is amended by adding a new paragraph (d) to read as follows:

§ 1.924 Assignment or transfer of control, voluntary or involuntary.

(a) * * *

(d) An applicant for voluntary transfer of control or assignment under this section where the subject license was acquired by the transferor or assignor through a system of random selection shall, together with its application for transfer of control or assignment, file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the consideration that the applicant would receive in return for the transfer or assignment of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below--market financing).

Part 21 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

3. The authority citation for Part 21 continues to read as follows:

AUTHORITY: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 610; 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552.

4. Section 21.38 is amended by adding a new paragraph (g) to read as follows:

§ 21.38 Assignment or transfer of station authorization.

(a) * * *

(g) An applicant for voluntary transfer of control or assignment under this section where the subject license was acquired by the transferor or assignor through a system of random selection shall, together with its application for transfer of control or assignment, file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration that the applicant would receive in return for the transfer or assignment of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below--market financing).

Part 22 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

5. The authority citation for Part 22 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, unless otherwise noted.

6. Section 22.39 is amended adding a new paragraph (d) to read as follows:

§ 22.39 Transfer of control or assignment of station authorization.

(a) * * *

(d) An applicant for voluntary transfer of control or assignment under this section where the subject license was acquired by the transferor or assignor through a system of random selection shall, together with its application for transfer of control or assignment, file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration that the applicant would receive in return for the transfer or assignment of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below--market financing).

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

7. The authority citation for Part 90 continues to read as follows:

AUTHORITY: Sections 4, 303, and 332, 48, Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 and 332, unless otherwise noted.

8. Section 90.153 is amended by adding two new sentences at the end of the existing sentence to read as follows:

§ 90.153 Transfer of control or assignment of station authorization.

An applicant for voluntary transfer of control or assignment under this section where the subject license was acquired by the transferor or assignor through a system of random selection shall, together with its application for transfer of control or assignment, file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration that the applicant would receive in return for the transfer or assignment of its license. This information should

include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below--market financing).

Part 94 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

9. The authority citation for Part 90 continues to read as follows:

AUTHORITY: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

10. Section 94.47 is amended by adding a new paragraph (c) to read as follows:

§ 94.47 Transfer and assignment of station authorization.

(a) * * *

(c) An applicant for voluntary transfer of control or assignment under this section where the subject license was acquired by the transferor or assignor through a system of random selection shall, together with its application for transfer of control or assignment, file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration that the applicant would receive in return for the transfer or assignment of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below--market financing).

Part 95 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

11. The authority citation for Part 95 continues to read as follows:

AUTHORITY: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

12. Section 95.821 is amended by adding two new sentences after the existing sentence to read as follows:

§ 95.821 Application for transfer of control.

An applicant for voluntary transfer of control or assignment under this section where the subject license was acquired by the transferor or assignor through a system of random selection shall, together with its application for transfer of control or assignment, file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration that the applicant would receive in return for the transfer or assignment of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below--market financing).

* * * * *

Appendix B

Final Regulatory Flexibility Analysis

As required by Section 603 of the Regulatory Flexibility Act, the Commission prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of the proposals contained in the Notice of Proposed Rule Making, PP Docket No. 93-253 on small entities. By this Order, the Commission responds to a Congressional directive contained in the Budget Act to consider measures to deter unjust enrichment in the lottery context. The Commission received no comments in response to the IRFA concerning unjust enrichment in the lottery context. As noted in the text of the Order, we considered and rejected more burdensome requirements designed to deter unjust enrichment, such as additional transfer restrictions for licensees that acquire their license by lottery. Rather, we adopted the less onerous transfer disclosure requirement that is expressly recommended in the Budget Act. In the case of some spectrum-based services, such as Low Power Television, entities that file transfer of control applications with the Commission are currently required to submit information similar to what the Commission explicitly requires by this Order: copies of documents that reveal the transfer price for a license. Further, in other services, applicants for voluntary transfer of control or assignment are currently required to submit information in support of their request. Inasmuch as any contracts, purchase agreements, or similar legal documents detailing the consideration received by the transferor or assignor will presumably already have been prepared by the parties to the transaction for their own purposes, attaching a copy of such documents to the application(s) submitted to the Commission should not prove onerous. Accordingly, the Commission does not believe this limited disclosure requirement adds a significant economic burden on small entities.